PICTURE THIS: RESOLVING THE CONFLICT BETWEEN POSTMORTEM CELEBRITY PUBLICITY RIGHTS AND DECEASED PHOTOGRAPHERS' COPYRIGHTED IMAGES

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I. INTRODUCTION

America's "celebrity obsession"[1] has spawned the careers of many individuals overnight, sometimes regardless of cognizable talent.[2] This obsession has increased the number and value of celebrity endorsements.[3] In fact, by attaching themselves to a product, many celebrities have significantly augmented their stream of income over that which they obtain through the more traditional performances for which they are known.[4] Furthermore, celebrities often continue

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[1] Bruce Horovitz, *The Good, Bad and Ugly of America's Celeb Obsession*, USA TODAY, Dec. 19, 2003, at 01B, *available at* 2003 WLNR 6117193 (noting that "America is enmeshed in a harmonic convergence of celebrity infatuation").

[2] *See, e.g.*, Laura M. Holson, *All the Celebrities You Want, on Your Cellphone*, N.Y. TIMES, Oct. 20, 2008, at B1, *available at* 2008 WLNR 19923587 (discussing how Kim Kardashian is essentially "famous for being famous" and achieved instant celebrity after the release of a pornographic home video).

[3] *See generally The Celebrity 100*, FORBES.COM, June 11, 2008, http://www.forbes.com/2008/06/11/most-powerful-celebrities-lists-celebrities08-cx_mn_0611c_land.html.

[4] *See, e.g.*, *The Celebrity 100: #2 Tiger Woods*, FORBES, June 11, 2008, http://www.forbes.com/lists/2008/53/celebrities08_Tiger-Woods_WR6D.html (describing Tiger Woods as holding lucrative sponsorships with Nike, Accenture, Gatorade, and Gillette in addition to his more traditional golf tournament prizes). Imagining a well-advertised product that is not coupled with a well-known endorser is difficult:

> Famous faces greet us at every turn—on billboards, on television, on public transport, in the newspapers and magazines, and even on cereal boxes. Celebrities are beginning to dominate modern society in many new and unprecedented ways. Celebrities can capture the imagination of a nation and the purses of the people. To be celebrated appears to be the apogee of success in our society, whether as an actor, a musi-

to generate sizeable amounts of income and recognition after their deaths.[5] A celebrity's economic value after death, however, usually depends on the deceased's ability to remain relevant to the public.[6] This requires that those acting on behalf of the deceased take affirmative steps to continue to create a public demand for the deceased's celebrity.

Because they are no longer able to create new work, deceased public figures, through their estates, remain current through the use

> cian, a professional athlete, a supermodel or a chef. Regardless, these public personalities wield significant power in contemporary society through their associations with causes, products and events.

David Tan, *Beyond Trademark Law: What the Right of Publicity Can Learn from Cultural Studies*, 25 CARDOZO ARTS & ENT. L.J. 913, 914 (2008).

[5] *See* Lea Goldman & Jake Paine, *Top-Earning Dead Celebrities*, FORBES.COM, Oct. 29, 2007, http://www.forbes.com/2007/10/26/top-dead-celebrity-biz-media-deadcelebs07-cz_lg_1029celeb.html (reporting that the thirteen top-earning dead celebrities grossed a combined $232 million in the twelve months prior to October 2007).

[6] *Id.* The rankings, which evaluated earnings for the period between October 2006 and October 2007, named Elvis Presley, with forty-nine million dollars in revenue, as the highest-grossing deceased celebrity. *Id.* A significant portion of this income stemmed from visits to Elvis's home and memorial museum, Graceland, which was renovated for the thirtieth anniversary of his death. *Id.* Although deceased for more than forty-five years at the time, Marilyn Monroe, grossing seven million dollars, ranked ninth on the list, while musician James Brown, who passed away on Christmas Day 2006, generated five million dollars and ranked eleventh. Lea Goldman & Jake Paine, *In Pictures: Top-Earning Dead Celebrities: Marilyn Monroe*, FORBES.COM, Oct. 29, 2007, http://www.forbes.com/2007/10/26/top-dead-celebrity-biz-media-deadcelebs07-cz_lg_1029celeb_slide_10.html?thisSpeed=30000; Lea Goldman & Jake Paine, *In Pictures: Top-Earning Dead Celebrities: James Brown*, FORBES.COM, Oct. 29, 2007, http://www.forbes.com/2007/10/26/top-dead-celebrity-biz-media-deadcelebs07-cz_lg_1029celeb_slide_12.html?thisSpeed=30000. The economic value of a celebrity's association with or endorsement of products, as well as the necessity of prolonged public relevance, was recognized in early publicity rights cases:

> Today, it is commonplace for individuals to promote or advertise commercial services and products or, as in the present case, even have their identities infused in the products. Individuals prominent in athletics, business, entertainment and the arts, for example, are frequently involved in such enterprises. . . . [C]ommercial use of an individual's identity is intended to increase the value or sales of the product by fusing the celebrity's identity with the product and thereby siphoning some of the publicity value or good will in the celebrity's persona into the product. This use is premised, in part, on public recognition and association with that person's name or likeness, or an ability to create such recognition. The commercial value of a particular person's identity thus primarily depends on that person's public visibility and the characteristics for which he or she is known.

Lugosi v. Universal Pictures (*Lugosi II*), 603 P.2d 425, 437–38 (Cal. 1979) (Bird, C.J., dissenting).

of their persona[7] in some form.[8] In many instances, a celebrity's persona encompasses or refers to her image; however, valuable photographic images require artistic collaboration with photographers during the celebrity's life.[9] As both celebrities and the photographers who helped capture and create their iconic status die, and as a result of both state postmortem rights of publicity[10] and federal copyright law,[11] the issue of which party has the last word as to what can be done with the photographs of the deceased celebrity remains unclear.[12] Competing interests exist between the descendible property interest created in the celebrity's persona and the right of a photographer to exploit his art.[13] The web of legal interests becomes even more entangled where the celebrity's estate is suing the photographer's estate (rather than the celebrity suing the photographer) because such postulation of the parties creates adversaries out of those who never actually contributed any sweat equity to the work.[14] In addition to the state and federal legal uncertainty, variation among the states' postmortem publicity laws also contributes to the confusion.[15] The issue of extending postmortem publicity rights parallels the controversial, yet seemingly continual, extension of copyright term lengths granted

[7] A "persona" can "include[] any use of the name, portrait, voice, picture or 'likeness' of the person." Michael Cameron, *'Celebrities Bill' Muzzles Press*, N.Y. POST, June 16, 2008, http://www.nypost.com/p/news/opinion/opedcolumnists/celebrities_bill_muzzles_press_WwcrlwekcGKG8zPswCKBgO.

[8] *See, e.g.*, Goldman & Paine, *supra* note 5 (noting that "Albert Einstein's name is used to peddle Baby Einstein DVDs").

[9] *See, e.g.*, Image Gallery of Herb Ritts, http://www.herbritts.com/images/ (last visited Aug. 22, 2009) (displaying iconic images of celebrities such as Al Pacino, Elizabeth Taylor, Johnny Depp, and Madonna taken by deceased celebrity-photographer Herb Ritts).

[10] *See* discussion *infra* Part III.

[11] *See* discussion *infra* Part IV.

[12] *See generally* Brown v. ACMI Pop Div., 873 N.E.2d 954 (Ill. App. Ct. 2007) (failing to address the issue when the estate of the late musician James Brown sued the copyright holder of several images of Brown that the holder was selling for commercial uses on the grounds that such sales allegedly infringed upon Brown's publicity rights).

[13] *Id. See also* discussion *infra* Part V.

[14] *See, e.g.*, Shaw Family Archives Ltd. v. CMG Worldwide, Inc., No. 05 Civ. 3939 (CM), 2008 U.S. Dist. LEXIS 67529 (S.D.N.Y. Sept. 2, 2008) (addressing the publicity-rights claims of the heirs of Marilyn Monroe's estate against the heirs of the late photographer Sam Shaw). The term "sweat equity" is defined as "an owner's labor on improvements that increase the value of the property." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1191 (1984).

[15] *See* discussion *infra* Part III.B.1.

to the holders of copyrighted images.[16] In states such as California, which are home to countless celebrities[17] and offer broad protection of publicity rights, future litigation on the issue seems unavoidable absent any legislative or judicial resolution.[18]

Recently, cases involving the estates of James Brown[19] and Marilyn Monroe[20] provided prime examples of the sort of litigation created by increased persona protection by the states. Although the courts in these two cases had the opportunity to confront the issue of whose right prevails between a photographer/copyright holder and a celebrity's estate, each court decided to avoid direct analysis. Thus, the first court to directly tackle the issue will set an influential standard for the rest of the country. Meanwhile, the earning potential of America's deceased celebrities and photographers hangs in the balance.

This Comment proposes a judicial test for determining which estate should have the right to exploit (or prevent exploitation of) a deceased celebrity's photograph taken by a deceased photographer when the rights of publicity and copyright clash. Part II of this Comment illustrates the need for such a test by examining the recent cases involving the estates of Marilyn Monroe and James Brown, each of which circumvented the issue when given the opportunity to confront it. Part III examines the history of the postmortem right of publicity and discusses the movement toward stronger and lengthier protection by considering the current position of statutory postmortem rights of publicity in relevant states. Part IV discusses federal-copyright law governing photographic images and examines the recent trend of continually extending the duration of the Federal Copyright Act. Finally, Part V examines the reasoning for both photographer and celebrity claims and advances an equitable guideline for future estates to follow to avoid costly litigation.

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[16] *See* Lugosi v. Universal Pictures (*Lugosi II*), 603 P.2d 425, 441–42 (Cal. 1979) (Bird, C.J., dissenting) (fashioning the length of postmortem publicity rights to the protection period given to an author under copyright law); *see also* 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 9.01 (2008).

[17] César G. Soriano, *Celebrities Have Their Days in Court*, USA TODAY, June 13, 2005, http://www.usatoday.com/life/people/2005-06-13-other-celeb-trials_x.htm (noting that most celebrities live in California).

[18] *See infra* Part III.B.1.a (discussing California's Publicity Rights statute, CAL. CIV. CODE § 3344.1 (West Supp. 2009)).

[19] *See* Brown v. ACMI Pop Div., 873 N.E.2d 954 (Ill. App. Ct. 2007).

[20] *See* Shaw Family Archives Ltd. v. CMG Worldwide, Inc., No. 05 Civ. 3939 (CM), 2008 U.S. Dist. LEXIS 67529 (S.D.N.Y. Sept. 2, 2008).

II. RECENT "CELEBRITY V. PHOTOGRAPHER" LITIGATION

Copyright and publicity law conflict where celebrities' personal interests appear in copyrighted works. Issues arise because copyright protection is afforded by title 17 of the United States Code, while publicity rights are often rooted in the common law and are granted by individual states. Because no national congruity exists among the state-created right of publicity,[21] cases in the crosshairs could very well be decided differently depending on the jurisdiction. Although a federal right of publicity has been advocated,[22] Congress has taken no steps to determine a standard for resolving this conflict. While the legislature is the natural forum to resolve this conflict, because Congress seems uninterested, the judiciary is left to balance the rights of each party.

In two recent cases, courts had the opportunity to guide future conflicts arising out of the intersection of postmortem publicity rights and federal copyright protection. The cases involved the lucrative estates of the late musician James Brown and the late actress Marilyn Monroe.[23] These actions presented the courts with the opportunity to set influential precedent and prevent future lawsuits arising out of these expanding and converging rights; however, both courts were hesitant to directly address the issue and, in fact, opted to avoid a potential resolution.

A. Shaw Family Archives, Ltd. v. CMG Worldwide, Inc.

Shaw Family Archives, Ltd. v. CMG Worldwide, Inc.[24] involved the estate of the late actress Marilyn Monroe. The action arose out of a dispute as to whether the descendants of photographer Sam Shaw had the right to commercially exploit famous photographs of Monroe.[25] During his lifetime, Shaw had captured several iconic images of the actress; after his death, the takers of his estate became the copyright holders of such pictures.[26] The takers of Monroe's estate contended that they alone had the right to exploit those images because

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[21] *See* discussion *infra* Part III.B.1.

[22] *See, e.g.*, INT'L TRADEMARK ASS'N, FEDERAL RIGHT OF PUBLICITY: REQUEST FOR ACTION BY THE INTA BOARD OF DIRECTORS (1998), http://www.inta.org/index.php?option=com_content&task=view&id=285&Itemid=153&getcontent=3.

[23] *See* Goldman & Paine, *supra* note 5.

[24] *CMG Worldwide*, 2008 U.S. Dist. LEXIS 67529.

[25] *Id.* at *3.

[26] *Id.* at *4.

they owned Monroe's right of publicity.[27] Significantly, because both original parties were already deceased at the time, neither Monroe herself nor Shaw brought claims in that case. The plaintiffs consisted of the family of Monroe's acting coach, Lee Strasberg, who had come to inherit the residue of Monroe's estate; they filed suit against Shaw's devisees.[28] *CMG Worldwide*, among other things, demonstrates the distance that can develop between the late artists and those with present-day financial interests in their work.

Although the disputed issue in *CMG Worldwide* involved the right to exploit the photographs of Monroe, the U.S. District Court for the Southern District of New York decided that the case turned on a choice-of-law issue. The court reasoned that "[w]hen Marilyn Monroe died, neither New York nor California recognized any posthumous right of publicity."[29] Because Monroe died in California, her estate contended that California's newly amended, retroactive right-of-publicity law[30] applied.[31] A successful argument for Monroe's estate would have meant that, although Monroe did not specifically bequeath her right of publicity at the time of her death, her descendible right would be upheld and read into the residue clause of her will because she fell within the retroactive period of the statute.

The court, however, found that Monroe died a domiciliary of New York, a state that refuses to recognize any posthumous publicity rights.[32] Because New York did not recognize Monroe's publicity rights in the first place, the court never properly addressed the issue of the postmortem right. This finding allowed the court to resolve the case without confronting the overarching issue: who has a stronger claim to a photograph of a deceased celebrity—the copyright holder or the celebrity's estate?

B. Brown v. ACMI Pop Div.

A case involving the estate of performer James Brown provided another opportunity for the judiciary to resolve competing interests between copyright holders of photographs of famous personalities

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[27] *Id.*

[28] *Id.*

[29] *Id.* at *6.

[30] CAL. CIV. CODE § 3344.1 (West Supp. 2009); *see also infra* Part III.B.1.a (discussing California's law).

[31] *CMG Worldwide*, 2008 U.S. Dist. LEXIS 67529, at *4.

[32] *See id.* at *12.

and the estates of such celebrities.[33] In *Brown*, the defendant was not actually the photographer but rather Corbis Corporation, which is "in the business of licensing copyrights for photographs and other artistic images."[34] *Brown* explained that the corporation, owned by Microsoft's Bill Gates, "either owns the copyrights to those images or is authorized to license the copyright to those images on behalf of photographers and artists whom Corbis represents and to whom Corbis pays royalties."[35] In that case, the trial court found that Brown's right of publicity was at issue because the defendant was not licensing the images under the fair-use doctrine[36] but was instead licensing it to private or commercial users.[37]

Although *Brown* ruled in favor of the plaintiff's estate by refusing Corbis's motion to dismiss, the court failed to directly address the complexities of the issue;[38] however, *Brown* did impart some wisdom from which one may infer the future outcome of similar suits. First, *Brown* applied the holding in *Toney v. L'Oreal USA, Inc.*[39]—that state right-of-publicity claims are not preempted by federal copyrights un-

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[33] *See generally* Brown v. ACMI Pop Div., 873 N.E.2d 954 (Ill. App. Ct. 2007).

[34] *Id.* at 956.

[35] *Id.*

[36] *See* 17 U.S.C. § 107 (2006). The statute explains that

> the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching . . . , scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
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> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational pur poses;
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> (2) the nature of the copyrighted work;
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> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.
>
> The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

Id.

[37] *Brown*, 873 N.E.2d at 956–57; s*ee* 765 ILL. COMP. STAT. ANN. 1075/5 (West, Westlaw through P.A. 96-155 of the 2009 Reg. Sess.) (defining "commercial purpose" as "the public use or holding out of an individual's identity (i) on or in connection with the offering for sale or sale of a product, merchandise, goods, or services; (ii) for purposes of advertising or promoting products, merchandise, goods, or services; or (iii) for the purpose of fundraising").

[38] *See Brown*, 873 N.E.2d at 963.

[39] 406 F.3d 905 (7th Cir. 2005).

der the Supremacy Clause[40]—to a postmortem right-of-publicity claim.[41] In *Toney*, the U.S. Court of Appeals for the Seventh Circuit concluded that the subject matter of a right-of-publicity claim is not a specific photograph but the "persona of the plaintiff as a human being."[42] The court determined that the plaintiff's identity was not "'fixed in a tangible medium of expression' and that the rights protected by the [Illinois Right of] Publicity Act are not 'equivalent' to any of the exclusive rights within the general scope . . . of the Copyright Act."[43] Thus, the state publicity law protecting one's persona was not preempted.[44] *Brown*'s application of *Toney* illustrates the judiciary's unwillingness to allow copyright to necessarily preempt postmortem publicity rights. Second, *Brown* implied that in situations where the copyright holder possesses and licenses images of deceased personalities in an intangible medium, such as the Internet, courts should look to the potential end user to see whether the result will be a fixed work of tangible use subject to right-of-publicity laws.[45] *Brown* did not, however, decide which claim was stronger and why and, thus, provided little guidance for subsequent courts to which the issue is presented.

III. THE STATE-CREATED RIGHT OF PUBLICITY

A celebrity's right of publicity[46] is designed to protect against the loss of financial opportunities by the celebrity if her persona is exploited commercially.[47] Publicity rights differ from privacy rights,

[40] *Id.* at 910.

[41] *Brown*, 873 N.E.2d at 963.

[42] *Id.* at 962 (quoting *Toney*, 406 F.2d at 908).

[43] *Id.* at 962–63 (quoting *Toney*, 406 F.3d at 909).

[44] *Id.* at 963.

[45] *Id.*

[46] The right of publicity is not restricted to celebrities; however, lawsuits generally arise "when famous celebrities bring action for liability or damage against advertisers or merchandisers of products for including messages that bear some representation of their public image." Michael Einhom, *Publicity Rights, Merchandising and Economic Reasoning*, 23 ENT. & SPORTS LAW., Fall 2005, at 1, 1. This Comment focuses on celebrities' rights, although the majority of its analysis may be applied generally to the right of publicity.

[47] *See* Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 576 (1977). *Zacchini* described the reasons for protecting property rights:

> The rationale for [protecting the right of publicity] is the straightforward one of preventing unjust enrichment by the theft of good will. No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay.

protections against false endorsement, and placing in a false light,[48] each of which was devised to prevent an individual from suffering mental anguish.[49] Presently, about forty states recognize publicity rights either by common law or by statute.[50] Because of the state-created nature of the tort, however, what may be protected in one state may not be protected in another.[51]

A. History of Publicity Rights

The right of publicity, born out of the right of privacy,[52] has evolved throughout state common law since 1953[53] and is defined as the "right of every human being to control the unauthorized use of his or her name, likeness or other index of personal identity for purposes of trade."[54] The term was so dubbed in the U.S. Court of Appeals for the Second Circuit decision *Haelan Laboratories v. Topps Chewing Gum*,[55] in which the court held that an individual "has a right in the publicity value of his photograph."[56] In that case, two rival chewing gum manufacturers disputed the right of an individual baseball player to lend exclusive rights to one of the companies to issue his card.[57] The court opined that prominent persons, such as professional baseball players, deserve to be compensated when their images

Id. (alteration in original) (quotation marks and citation omitted).

[48] *Id.* at 573.

[49] *See id.* ("The interest protected in permitting recovery for placing the plaintiff in a false light is clearly that of reputation, with the same overtones of mental distress as in defamation.") (internal quotation marks omitted); s*ee also* Lugosi v. Universal Pictures (*Lugosi II*), 603 P.2d 425, 438–39 (Cal. 1979) (Bird, C.J., dissenting) (opining that "the gravamen of the harm flowing from an unauthorized commercial use of a prominent individual's likeness in most cases is the loss of potential financial gain, not mental anguish").

[50] *See* 1 J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 6:3 (2d ed. 2008).

[51] PublicDomainSherpa.com, The Rights of Publicity and Privacy, http://www.publicdomainsherpa.com/rights-of-publicity-and-privacy.html (last visited Feb. 3, 2010).

[52] *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46(b) (1995) (explaining that "[t]he principal historical antecedent of the right of publicity is the right of privacy").

[53] *See generally* Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir. 1953).

[54] Einhom, *supra* note 46, at 1 (citing RESTATEMENT (THIRD) ON UNFAIR COMPETITION § 46 (1995)).

[55] *Topps*, 202 F.2d at 868.

[56] *Id.*

[57] *Id.* at 867.

and personas are used to advertise or sell products.[58] The court recognized that celebrities, because of their social influence and associative value,[59] needed a way to prohibit others from using their likenesses without just compensation.[60] The court reasoned that without the ability to prevent others from exploiting their persona, celebrities' ability to profit from the grant would be severely diminished.[61]

Within a year of the *Topps* decision, Melville Nimmer published the seminal article *The Right of Publicity*, further sculpting the newly recognized right.[62] Nimmer defined the right of publicity as "the right to reap and control the commercial value of one's identity for advertising and other commercial purposes and the related right to stop others from exploiting the same."[63] The article additionally asserted that previously accepted privacy-based models were deficient for several reasons[64] and that publicity rights, therefore, should be independent and descendible property rights.[65] Nimmer proffered that publicity rights should be freely assignable property rights, and he focused on a recognized persona's financial value.[66]

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[58] *Id.* at 868.

[59] *See* Tan, *supra* note 4, at 920 (describing how publicity rights have "grown out of the commercial reality of the burgeoning 'associative value' that celebrities impose upon products and services"); s*ee also* J. Thomas McCarthy, Professor of Law, Univ. of San Francisco, The Spring 1995 Horace S. Manges Lecture at Columbia University School of Law—The Human Persona as Commercial Property: The Right of Publicity (Mar. 9, 1995), *in* 19 COLUM.-VLA J.L. & ARTS 129, 133 (1995).

[60] *Topps*, 202 F.2d at 868.

[61] *Id.*

[62] Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203 (1954).

[63] Einhom, *supra* note 46, at 23 (citing Melville, *supra* note 62, at 215–18).

[64] These reasons could be characterized as follows:

> [F]irst, in order to retain pecuniary value, the right of publicity must be assignable; second, there should be a cause of action regardless of whether the likeness was used in an offensive manner; third, damages ought to be computed in terms of the value of the publicity to the defendant, rather then [sic] the injury to the plaintiff; and fourth, that no waiver of this right should occur because one becomes a well-known personality.

John C. Fuller, Case Note, *Like a Candle in the Wind:* Shaw Family Archives, Ltd. v. CMG Worldwide, Inc. *and the Flickering Recognition of Marilyn Monroe's Right of Publicity in New York*, 15 VILL. SPORTS & ENT. L.J. 299, 310 (2008).

[65] Nimmer, *supra* note 62, at 216.

[66] *Id.* (explaining that "in most instances a person achieves publicity values of substantial pecuniary worth only after he has expended considerable time, effort, skill, and even money").

Subsequent to the publication of Nimmer's article, William Prosser authored an influential law review article[67] that categorized privacy rights into four separate torts:

> 1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
> 2. Public disclosure of embarrassing private facts about the plaintiff.
> 3. Publicity which places the plaintiff in a false light in the public eye.
> 4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.[68]

This fourth tort, although not directly labeled a publicity right, does resemble the idea of one.[69] The American Law Institute found Prosser's distinctions so plausible that they adopted his ideas for the *Restatement (Second) of Torts*.[70] Both Nimmer's and Prosser's works led to the currently accepted concept of the "right of publicity" found in the *Restatement (Third) of Unfair Competition*.[71] With the foundation laid for states to recognize a right of publicity, implementation depended upon state legislatures codifying the right.

B. The Postmortem Right of Publicity

The right of publicity, although only recognized over the past fifty-five years,[72] is under continuous development. Because it is an evolving area of state law, controversy often arises as to its implementation and recognition.[73] The right of publicity's evolution, from its

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[67] *See generally* William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).

[68] *Id.* at 389.

[69] *See* MCCARTHY, *supra* note 50, §§ 1:3, :23. Prosser's "appropriation" tort differs from publicity rights because the right of publicity can be considered an assignable property right rather than a personal interest. *Id.* § 5:65, :67. Also, when calculating damages, courts determine the harm by examining injury to the plaintiff's feelings or psyche in "appropriation" cases, whereas in right-of-publicity cases, courts measure harm in terms of the value of the enrichment to the defendant. *Id.* § 5:63.

[70] *See* RESTATEMENT (SECOND) OF TORTS §§ 652B–E (1977).

[71] *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46(b) (1995).

[72] The term "right of publicity" was first coined in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953).

[73] *See* Craig Miller, *Craig's Corner for Counsel: Right of Publicity*, METROPOLITAN CORP. COUNS., Sept. 2008, at 4, 4, *available at* http://www.metrocorpcounsel.com/pdf/2008/September/04.pdf. Mark Lee, a partner at Manatt, Phelps and Phillips, LLP in Los Angeles, stated the following:

> The fact that [the right of publicity] is governed by state law makes it an especially complex area . . . . I've called the present state law regime a crazy quilt of inconsistent laws that make it very difficult for

birth in privacy law to its current status as an independently recognized property right,[74] naturally led to questions regarding the rights of deceased individuals.[75] In *Price v. Hal Roach Studios, Inc.*,[76] the widows of comedic actors Laurel and Hardy sued the copyright owners of particular Laurel and Hardy films for misappropriating the names and likenesses of the two deceased comedians for commercial gain.[77] *Price* explained the justification of a postmortem right of publicity as serving the financial interests associated with property rights, as opposed to certain privacy rights' protection of one's feelings, which naturally expire at death.[78] The court opined that the defendant's copyright was in the films themselves and not in the comedians' names and likenesses.[79]

A key distinction drawn in *Price* was between personality and property rights. Treating one's persona or likeness as property, which is freely alienable and inheritable, potentially allows for the right to survive the loss of the celebrity itself. The first case to acknowledge a descendible right of publicity was *Lugosi v. Universal Pictures* (*Lugosi I*).[80] In that case, the widow and son of Bela Lugosi, who

> third parties to know what they can do, and for rights holders to know what they can stop.

Id. (internal quotation marks omitted).

[74] *See* Reeves v. United Artists, 572 F. Supp. 1231, 1234 (N.D. Ohio 1983) (comparing the non-descendible right of privacy and the descendible right of publicity).

[75] *See* MCCARTHY, *supra* note 50, § 9:18. Nineteen states have statutes that specifically acknowledge the publicity rights of the deceased. Lawrence J. Siskind, *Regenerating the Rights of the Living Dead*, LAW.COM, May 11, 2009, http://www.law.com/jsp/legaltechnology/pubArticleLT.jsp?id=1202430564207. Five states have also recognized a common-law postmortem right of publicity, including: Connecticut, Georgia, Michigan, New Jersey, and Utah. MCCARTHY, *supra* note 50, at §§ 9:21, :23, :27, :30, :37.

[76] 400 F. Supp. 836 (S.D.N.Y. 1975).

[77] *Id.* at 837–38.

[78] *Id.* at 844. Because the right of publicity is proprietary in nature,

> [w]hen determining the scope of the right of publicity . . . one must take into account the purely commercial nature of the protected right. . . . There appears to be no logical reason to terminate this right upon death of the person protected. It is for this reason, presumably, that this publicity right has been deemed a "property right."

Id.

[79] *Id.*

[80] 172 U.S.P.Q. (BNA) 541 (Cal. Super. Ct. 1972), *rev'd*, 603 P.2d 425 (Cal. 1979). *See* David R. Ginsburg, Comment, *Transfer of the Right of Publicity: Dracula's Progeny and Privacy's Stepchild*, 22 UCLA L. REV. 1103, 1113–17 (1975) (providing an in-depth discussion of *Lugosi I*).

played the title role in the 1931 film *Dracula*,[81] sued the studio in the Southern District of New York to recover profits derived from the use of Lugosi's likeness for a variety of merchandise.[82]

At trial, the *Lugosi I.* court relied on *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*[83] and held that the right of publicity did not end at Lugosi's death; thus, the actor's beneficiaries were allowed to recover.[84] On appeal, the California Supreme Court examined the difficulty in determining when a deceased personality enters into the public domain and who should draw the line.[85] The court concluded that the right of publicity was non-descendible and ended with the death of the actor.[86] *Lugosi II* did imply, however, that had Lugosi exploited his name, likeness, or identity as Dracula for commercial purposes while living, he would have created a descendible property right under California common law.[87] The court reasoned that allowing a descendible publicity right of a deceased personality who never

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[81] DRACULA (Universal Pictures 1931).

[82] *Lugosi I*, 172 U.S.P.Q. (BNA) at 541.

[83] *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953).

[84] *Lugosi I*, 172 U.S.P.Q. (BNA) at 555.

[85] The California Supreme Court noted the following:

> If the opportunities of a person to exploit a name or likeness in one's lifetime are inheritable property, may it be assumed that if the first heirs thereof, like their immediate ancestor, do not exploit similar opportunities the right to do so is automatically transferred to succeeding heirs? . . . If not, where is the line to be drawn, and who should draw it? Assuming that some durational limitation would be appropriate, it has been suggested that the adoption of such a limitation would be "beyond the scope of judicial authority," and that "legislative action will be required . . . ."

Lugosi v. Universal Pictures (*Lugosi II*), 603 P.2d 425, 430 (Cal. 1979).

[86] *Id.* at 431 n.8.

[87] *Id.* at 429; *see also id.* at 432–33 (Mosk, J., concurring). Justice Mosk reasoned that Bela Lugosi was not entitled to publicity rights as Dracula because he was merely an actor in the film and had therefore contracted away his rights to the studio; however, in cases where the character is the creation of the actor portraying him, such as in *Price v. Hal Roach Studios, Inc.*, 400 F.Supp. 836 (S.D.N.Y. 1975), the publicity right would be protected. *Lugosi II*, 603 P.2d at 432–33 (Mosk, J., concurring). *But see id.* at 445 (Bird, C.J., dissenting). Chief Justice Bird contends that although many men have portrayed the character Dracula, Universal

> sought to capitalize on the particular image of Lugosi in this portrayal of Count Dracula and the public recognition generated by his performance. Such use is illustrative of the very interests the right of publicity is intended to protect. Hence, Lugosi had a protectable property interest in controlling unauthorized commercial exploitation of his likeness in his portrayal of Count Dracula.

Id. (emphasis omitted).

exploited his right while alive neither serves society's interest in the free dissemination of ideas nor the artist's rights to the fruits of his own labor.[88] The *Lugosi* cases, and others like them, demonstrate the clarity that state legislation honed specifically at postmortem-publicity rights can provide for estates.

Although the right of publicity is derived from the common law, several states have ratified legislation recognizing a postmortem right of publicity.[89] Because the right of publicity is a property right and is therefore determined by the individual states, each state recognizes the deceased's right for varying lengths of time.[90] This disparity breeds controversy in determining which state's law to apply[91] because of the potential favorability of certain forums. Wisconsin, for example, does not recognize any right of publicity,[92] whereas Tennessee recognizes the postmortem right as long as the deceased's heirs continue to exploit it.[93] Therefore, celebrities' estates would likely prefer to bring publicity actions in forums such as Tennessee rather than those like Wisconsin. A nationally accepted rule would help curb forum shopping.

The significance of a state's recognition of a postmortem right and its duration is considerable when examining the potential of one's economic value as a celebrity.[94] In an instance where the right to capitalize on the celebrity's name and likeness expires upon death, the value to any one individual trying to exploit it severely diminishes and is instead spread thinly among any and all who choose to pursue it.

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[88] *Id.* at 431 (majority opinion). These appear to be two of the major policy reasons for recognition of a descendible right of publicity.

[89] *See* MCCARTHY, *supra* note 50, § 9:18 (explaining that nineteen states officially recognize a postmortem right).

[90] *Id.*

[91] *See supra* Part II (discussing Brown v. ACMI Pop Div., 873 N.E.2d 954 (Ill. App. Ct. 2007) and Shaw Family Archives Ltd. v. CMG Worldwide, Inc., No. 05 Civ. 3939 (CM), 2008 U.S. Dist. LEXIS 67529 (S.D.N.Y. Sept. 2, 2008)).

[92] *See* MCCARTHY, *supra* note 50, § 9:40.

[93] TENN. CODE ANN. § 47-25-1104 (LEXIS through 2008 Regular Sess.). Tennessee allows the estate ten years to decide whether to use the deceased's identity commercially, at which time the estate's right either expires if unused or continues indefinitely if exploited. *Id.*

[94] *See* Goldman & Paine, *supra* note 5 (noting that James Brown's estate grossed five million dollars in 2007).

C. Current Significant State Statutes

Although many states recognize an individual's right of publicity, examining the current status of postmortem rights in specific states facilitates an understanding of recent trends.[95] Presently, states generally prefer to adopt stronger legislation in favor of celebrity rights both during life and after death.[96] Although certain states have recently denied campaigns to recognize a descendible right of publicity, such action seems to be the exception rather than the rule.[97] Because photographers' rights[98] are well established in the Copyright Clause,[99] the protection afforded to public personalities by the separate states will often determine the success of right-of-publicity claims. The following states' publicity rights statutes have each played a role in the litigation of both James Brown's and Marilyn Monroe's estates. Each example, while taking a different approach to publicity rights, represents the variety of legislation found throughout the states.

1. California

California has a statutory right of publicity[100] with one of the more aggressive postmortem-recognition clauses in the country.[101]

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[95] *See* MCCARTHY, *supra* note 50.

[96] *See infra* Part III.B.1.a (discussing California's statute); *see also* Anthony V. Lupo & Sarah L. Bruno, *Washington State Amends Right to Publicity Statute*, ARENT FOX LLP, Mar. 26, 2008, http://www.arentfox.com/publications/index.cfm?fa=legalUpdateDisp&content_id=1535 (discussing Washington's recent amendments to the Washington Personality Rights Act).

[97] *See infra* Part III.B.1.d (discussing New York's decision not to pass publicity rights legislation).

[98] For the purposes of this Comment, photographers' rights are meant to also include photographers' estates and any copyright holders of an image.

[99] U.S. CONST. art. I, § 8, cl. 8 ("promot[ing] the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries").

[100] CAL. CIV. CODE § 3344.1 (West Supp. 2010) (defining California's right of publicity).

[101] *See id.* § 3344.1(b). California's law explains that publicity rights are

> freely transferable or descendible, in whole or in part . . . . [Publicity rights] shall be deemed to have existed at the time of death of any deceased personality who died prior to January 1, 1985, and . . . shall vest in the persons entitled to these property rights under the testamentary instrument of the deceased personality effective as of the date of his or her death.

Id. See also Laura Hock, Comment, *What's in a Name? Fred Goldman's Quest to Acquire O.J. Simpson's Right of Publicity and the Suit's Implications for Celebrities*, 35 PEPP. L. REV. 347, 369–70 (2008) (providing a detailed discussion of California's statutory right of publicity).

The state's strong ties to the film industry were certainly a chief consideration behind the legislation. In 1984, California passed legislation guaranteeing its movie stars postmortem publicity rights; additionally, the California legislature voted to "clarify" the statute in 2007, purporting to make it apply retroactively.[102] The act, which took effect on January 1, 2008, determined that the assignable right applied retroactively to any individual who died in the seventy years prior to the statutes' initial enactment in 1985.[103] This retroactive application, in addition to the seventy-year postmortem recognition,[104] demonstrates California's intent both to set the bar in terms of comprehensive protection for the individual and to protect Hollywood's earning potential.[105]

2. Indiana

Indiana's statutory protection of publicity rights[106] is perhaps even more celebrity-friendly than California's. The right of publicity may be asserted either by the personality or by "a person to whom the recognized rights of a personality have been transferred."[107] The statute protects essentially any violation of one's right of publicity that occurs within the state, regardless of where the violation occurs or

[102] Shaw Family Archives Ltd. v. CMG Worldwide, Inc., No. 05 Civ. 3939 (CM), 2008 U.S. Dist. LEXIS 67529, at *6 (S.D.N.Y. Sept. 2, 2008).

[103] CAL. CIV. CODE § 3344.1(h) (West Supp. 2009). The statute explains that

> "deceased personality" means any natural person whose name, voice, signature, photograph, or likeness has commercial value at the time of his or her death, whether or not during the lifetime of that natural person the person used his or her name, voice, signature, photograph, or likeness on or in products, merchandise or goods, or for purposes of advertising or selling, or solicitation of purchase of, products, merchandise, goods, or services. A "deceased personality" shall include, without limitation, any such natural person who has died within 70 years prior to January 1, 1985.

Id.

[104] *Id.* § 3344.1(g) (stating that "[n]o action shall be brought under this section by reason of any use of a deceased personality's name, voice, signature, photograph, or likeness occurring after the expiration of [seventy] years after the death of the deceased personality").

[105] *See* 2007 Cal. Adv. Legis. Serv. 439 (Deering) (explaining that the California Legislature's intent, when passing the 2007 amendments to California's right-of-publicity statute, was to nullify the two summary-judgment rulings against the holders of Marilyn Monroe's right of publicity in that year).

[106] IND. CODE ANN. § 32-36-1-1 (LEXIS through 2009 First Regular Sess. and Special Sess.) (outlining Indiana's publicity rights).

[107] *Id.* § 32-36-1-17.

where the personality is domiciled.[108] Indiana's statute preserves one's right for 100 years after death.[109]

3. Illinois

Illinois had no common-law right of publicity, but in 1999, the Illinois legislature passed the Right of Publicity Act, which statutorily granted the right.[110] This right is descendible[111] for fifty years after the celebrity's death.[112] The statute focuses on the commercial purpose of the use of the image to determine potential violations of one's publicity rights.[113] The Illinois State Legislature is contemplating, however, amending its statute to "allow companies to sell license rights to images without being liable for customers' illegal use of those images."[114] If amended, this change would benefit companies that license images to various sources, such as Bill Gates's Corbis Corporation,[115] which is based in Chicago.[116] Illinois's legislative interests[117] seem to contrast with those of California.[118] These two states' handling of publicity rights illustrates the power that lobbyists' inter-

[108] *Id.* § 32-36-1-1; *see also* Shaw Family Archives Ltd. v. CMG Worldwide, Inc., No. 05 Civ. 3939 (CM), 2008 U.S. Dist. LEXIS 67529, at *7–8 (S.D.N.Y. Sept. 2, 2008). The *Shaw* court noted the breadth of Indiana's law:

> Indiana's 1994 Right of Publicity Act . . . . passed over three decades after Ms. Monroe's death, by a state with which she had (as far as the court is aware) absolutely no contact during her life, creates a descendible and freely transferable right of publicity that survives for 100 years after a personality's death. The statute purports to apply to an act or event that occurs within Indiana, regardless of a personality's domicile, residence, or citizenship.

CMG Worldwide, 2008 U.S. Dist. LEXIS 67529, at *7–8.

[109] IND. CODE ANN. § 32-36-1-7 (LEXIS through 2009 First Regular Sess. and Special Sess.).

[110] 765 ILL. COMP. STAT. ANN. 1075/1–60 (LEXIS through Public Acts 96-338, 96-439, 96-454, 96-552, and 96-709 of the 2009 Sess.).

[111] *See id.* § 1075/15.

[112] *See id.* § 1075/30(b).

[113] *See id.* § 1075/10; *see also supra* note 37 (defining "commercial purpose").

[114] John T. Brooks & Taylor Corbitt, *Celebrity Estates Face Off with Publicity Laws*, TR. & ESTATES, June 19, 2008, http://trustsandestates.com/fiduciary/famous_die_who_profits_0619/index.html.

[115] *Id.*

[116] *Id.* (explaining that Corbis sells licenses to its more than 100 million images online, including those of celebrities, without warning consumers that using them commercially requires additional licensing).

[117] *Id.*

[118] *See* 2007 Cal. Adv. Legis. Serv. 439 (Deering).

ests can play in legislative decision making as opposed to legislatures relying on equitable considerations.

4. New York

New York, like California, is home to numerous celebrities and personalities; however, it is one of only a small number of states that expressly denies individuals any descendible right of publicity.[119] New York's struggle with publicity rights also has allowed for strong lobbying efforts on both sides of the issue.[120] Although New York recognizes a right of privacy, this right ends abruptly upon one's death because it is not a property right.[121] Today's celebrities would better serve their heirs economically by living in a state like California, where the publicity right's holder could continue to turn a postmortem profit, as compared to New York, where the deceased personality would instantly enter the public domain.[122]

IV. FEDERAL COPYRIGHT LAW

Copyright, designated in title 17 of the United States Code,[123] protects authors of published or unpublished original works, includ-

[119] *See* Pirone v. MacMillan, Inc., 894 F.2d 579, 586 (2d. Cir. 1990) (denying that there is a New York common-law right of publicity); *see also* Price v. Hal Roach Studios, Inc., 400 F. Supp. 836, 843 (S.D.N.Y. 1975). The *Price* court described the lack of publicity rights in New York and stated that "there is a statutory right which protects living persons from commercial exploitation of their names and pictures by others without their written consent. This statutory right . . . is predicated upon the classic right of privacy's theoretical basis which is to prevent injury to feelings." *Price*, 400 F. Supp. at 843.

[120] *See* Mark G. Tratos & Stephen Wiezencker, *Dead Celebrity Wars*, 25 ENT. & SPORTS LAW., Summer 2007, at 1, 17. Many high-profile names have been associated with lobbying efforts:

> In support of the legislation, groups like the Screen Actors Guild and individual celebrities such as Al Pacino, Yoko Ono, and Liza Minnelli, plus the representatives of the estates of musician [Jimi] Hendrix and the estates of baseball greats Babe Ruth, Jackie Robinson, Lou [Gehrig], and Mickey Mantle, have come out to support legislative efforts to reverse the adverse court decisions. Opposing the legislation are powerful interests such as the New York Newspaper Publishers Association and the estates of many now-deceased photographers.

Id.

[121] *See* N.Y. CIV. RIGHTS LAW §§ 50–51 (McKinney 1992).

[122] *See, e.g.*, Shaw Family Archives Ltd. v. CMG Worldwide, Inc., No. 05 Civ. 3939 (CM), 2008 U.S. Dist. LEXIS 67529 (S.D.N.Y. Sept. 2, 2008) (detailing the financial consequences to Marilyn Monroe's estate after the court found in that case that Monroe was domiciled in New York at the time of her death rather than in California).

[123] 17 U.S.C. §§ 101–1332 (2006).

ing, "literary, dramatic, musical, artistic, and certain other intellectual works."[124] Copyright law requires the permission of the copyright owner to "reproduc[e], distribut[e], broadcast[], publicly display[] or publicly perform[]" copyrighted or derivative works.[125] Copyright law does permit, however, certain uses to qualify for the Fair Use Doctrine, which is an affirmative defense to copyright violations.[126] Copyright law is not meant to protect an author's ideas; it is meant only to protect the author's expression of them.[127] Ideas are meant to be freely disseminated and remain in the public domain regardless of the copyright protection afforded to their more tangible expressions.[128]

Originally, the Copyright Act was very strict in its application, covering only maps, charts, and books.[129] In addition, protection was only granted to American authors who appropriately registered and deposited their works, giving them "an exclusive right over printing, reprinting, publishing, and vending only."[130] If registered, an author's work was protected for only fourteen years and was renewable once if the author was alive at the expiration of the initial protection.[131]

Copyright law was designed "to promote the progress of science" by granting authors "exclusive rights" for "limited times."[132] Tradi-

[124] U.S. COPYRIGHT OFFICE, COPYRIGHT BASICS, http://www.copyright.gov/circs/circ1.pdf (last visited Aug. 22, 2009).

[125] *See* Mark H. Wittow & Martin L. Stern, *User-Generated Videos Online Raise Vexing Issues*, NAT'L L.J., Oct. 13, 2008, at S4, *available at* 10/13/2008 Nat'l L.J. S4, (Col. 1) (West).

[126] *See supra* note 36.

[127] *See* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 555 (1985); *see also* Richard A. Epstein, *The Dubious Constitutionality of the Copyright Term Extension Act*, 36 LOY. L.A. L. REV. 123, 149 (2002) (explaining that "[i]n dealing with copyrighted material, the law of copyright only protects the expression of ideas and not the ideas themselves").

[128] *See* Epstein, *supra* note 127, at 149.

[129] *See* 1 NIMMER & NIMMER, *supra* note 16, § 1.08[B] (describing the original Copyright Act).

[130] Lawrence Lessig, Professor of Law, Stanford Law Sch., Dunwoody Lecture at the University of Florida Fredric G. Levin College of Law: The Creative Commons (Apr. 26, 2002), *in* 55 FLA. L. REV. 763, 768–69 (2003) (discussing the history of copyright).

[131] *Id.*

[132] *See* U.S. CONST. art. I, § 8, cl. 8; *see also* Lawrence Lessig, Professor of Law, Stanford Law Sch., Melville B. Nimmer Memorial Lecture at UCLA: Copyright's First Amendment, (Mar. 1, 2001), *in* 48 UCLA L. REV. 1057, 1062 (2001) (discussing the

tionally, the most significant constitutional hurdle to overcome to receive copyright protection was to qualify one's work as a "writing."[133] The Supreme Court, in an effort to clarify an otherwise vague term, found that "'writings' . . . may be interpreted to include any physical rendering of the fruits of creative intellectual or aesthetic labor."[134] Courts have subsequently engaged, almost universally, in a liberal construction of "writings."[135] For example, under section 102 of the current Copyright Act,[136] even pantomimes are eligible for copyright protection provided their work is silent and dramatic.[137] The qualifications of "writings" are meant to evolve with the times rather than to be restricted to interpretations available at the time of enactment.[138]

A. History of Photographic Copyright Law

The invention of photography caused difficulty in copyright law.[139] The dispute stemmed from the issue of whether a photograph merely captured a non-copyrightable idea or whether, by making that idea tangible, the photographer created a work capable of being copyrighted.[140] Unsurprisingly, a professional photographer would argue that his vision and application is as much art and authorship as that of a painter. The argument could be presented, however, that the true art is the subject of the photograph, which is not of the photographer's creation. "Where creativity refers to the nature of the work itself, originality refers to the nature of the author's contribution to the work."[141] The issue turns on whether the photographer makes enough of an original contribution to his photography.

original duration of copyright compared to the current liberal construction of the phrase "for limited times").

[133] 1 NIMMER & NIMMER, *supra* note 16, § 1.08[A].

[134] Goldstein v. California, 412 U.S. 546, 561 (1973).

[135] 1 NIMMER & NIMMER, *supra* note 16, § 1.08 (describing the liberal construction of "writings").

[136] 17 U.S.C. § 102(a) (2006).

[137] *See* 1 NIMMER & NIMMER, *supra* note 16, § 2.07.

[138] Reiss v. Nat'l Quotation Bureau, Inc., 276 F. 717, 719 (S.D.N.Y. 1921) (explaining the Copyright Clause's evolution in that its "grants of power to Congress compromise, not only what was then known, but what the ingenuity of men should devise thereafter").

[139] *See* Bernard Edelman, *The Law's Eye: Nature and Copyright*, *in* OF AUTHORS AND ORIGINS: ESSAYS ON COPYRIGHT LAW 79, 84–85 (Brad Sherman & Alain Strowel eds., 1994).

[140] *See* 1 NIMMER & NIMMER, *supra* note 16, § 2.08[E].

[141] *Id.* § 2.08.

The Supreme Court addressed the issue in *Burrow-Giles Lithographic Co. v. Sarony*[142] and held that a photographed portrait of Oscar Wilde[143] was considered a writing for copyright purposes.[144] This decision did not, however, address the status of more everyday photographs, which have subsequently been found to be "writings" as well.[145] The debate as to whether a photograph is a writing was put to rest by the adoption of section 102(a)(5) of the Copyright Act,[146] which definitively classifies photographs as writings.[147] "The Copyright Act does not contain a definition of a photograph, but subject to the fixation requirement, it would appear to include any product of the photographic process, whether in print or negative form, including filmstrips, slide films and individual slides."[148]

B. The Copyright Extension Act

Similar to the right of publicity,[149] the recent trend in copyright law has been to lengthen copyright terms to provide protection after the author's death. The original length of a copyright was one fourteen-year term with the potential for authors still living at the time of expiration to obtain a reversion for an additional fourteen years.[150] These relatively strict copyright lives were meant to serve the function granted by the phrase "for limited times"[151] found in the Copyright Clause.

Beginning in 1962, however, Congress began to enact increasingly longer extensions of the terms for existing copyrights.[152] These extensions began as brief one or two-year expansions, but those small

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[142] Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1884).

[143] *See generally* The Official Web Site of Oscar Wilde, http://www.cmgww.com/historic/wilde/bio1.htm (last visited Aug. 22, 2009) (explaining Wilde's celebrity).

[144] *Sarony*, 111 U.S. at 60.

[145] *See* Jewelers' Circular Publ'g Co. v. Keystone Publ'g Co., 274 F. 932 (S.D.N.Y. 1921), *aff'd*, 281 F. 83 (2d Cir. 1922); *see also* Time, Inc. v. Bernard Geis Assocs., 293 F. Supp. 130 (S.D.N.Y. 1968). Photographs do not need a great amount of inventiveness to suffice as a writing. For example, a professional photographer's product photos of a vodka company's bottle were found to be subject to copyright protection. *See* Ets-Hokin v. Skyy Spirits, 225 F.3d 1068, 1081 (9th Cir. 2000).

[146] 17 U.S.C. § 102(a)(5) (2006).

[147] *Id.*; *see also* 1 NIMMER & NIMMER, *supra* note 16, § 2.08.

[148] 1 NIMMER & NIMMER, *supra* note 16, § 2.08.

[149] *See supra* Part III.B (discussing postmortem right-of-publicity trends).

[150] 3 NIMMER & NIMMER, *supra* note 16, § 9.01.

[151] U.S. CONST. art. I, § 8, cl. 8.

[152] *See* Lessig, *supra* note 130, at 764.

incremental increases have given way to much larger ones.[153] The Sonny Bono Copyright Term Extension Act[154] lengthened the term of copyrights by twenty years.[155] Currently, copyrights extend for the author's life plus seventy years—five times that of the original act.[156] Unlike the postmortem publicity rights statutes in states like California, however, these copyright extensions apply only to future copyrights and to those still in effect at the time of passage, not to those that have already lapsed.[157] Opponents of broad copyright protection submit that now, the images that a young photographer takes of an older celebrity could remain out of the public domain for close to 150 years.[158] Because relatively few celebrities remain in the spotlight for six or seven generations, their actual fans and other artists are likely left perpetually without unrestricted access to these images. Although it is argued that increased access to copyrighted images promotes creativity throughout the artistic community, the seventy-year delay in access following a photographer's death severely limits the relevance of the celebrity and therefore his creative inspirational worth.[159]

Copyright law's limited grant requirement has been touted as a means to foster creativity.[160] Potential authors who have the ability to create works that will be protected for long periods of time are re-

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[153] *Id.*

[154] Sonny Bono Copyright Term Extension Act of 1998, Pub. L. No. 105-298, § 102, 112 Stat. 2827, 2827 (codified as amended in scattered sections of 17 U.S.C.).

[155] *Id.*; *see also* Lessig, *supra* note 130, at 764. S*ee generally* Epstein, *supra* note 127 (discussing the extension of copyright terms to seventy years after the author's death by the Sonny Bono Copyright Term Extension Act).

[156] *See* Sonny Bono Copyright Term Extension Act; *see also* 3 NIMMER & NIMMER, *supra* note 16, § 9.01 (stating that "[p]re-existing works that had not yet entered the public domain, in addition, are now potentially accorded ninety-five years of protection").

[157] *See* Epstein, *supra* note 127, at 124; *see also* 3 NIMMER & NIMMER, *supra* note 16, § 9.01 (discussing the disparity in protection of copyrighted work depending on when the work was created, stating that "[s]uccessive lengthening of the period of protection leaves works subject to disparate terms, depending on when they were created in relation to the schemes later adopted during the period of their protection").

[158] *See generally* Lessig, *supra* note 130.

[159] *See id.* at 764 (discussing the creative detriment imposed by the increased length of copyright protection).

[160] *See* Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) ("[T]he limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward . . . ."); *see also* Epstein, *supra* note 127, at 126 (explaining the relevance of the fixed-duration copyright protection).

warded with economic incentives to create.[161] The logic behind this theory is that shorter protection periods would not be worth the time and energy needed to create, whereas longer periods allow more time for the author to exclusively derive income from his work.[162]

Like publicity rights, copyright law also has had lobbies of public personalities and well-known entities on both sides of the duration issue.[163] Additionally, although no one debates the necessity of authors' postmortem copyrights, disagreement continues in regard to what really is the optimal duration.[164] Because of the "for limited times" requirement, the duration must be definite;[165] however, the optimal length likely depends on whatever length best "promote[s] the Progress of Science and useful Arts."[166]

V. RESOLVING CONFLICTS BETWEEN POSTMORTEM PUBLICITY RIGHTS AND COPYRIGHT

If anything is clear with regard to the current status of postmortem right-of-publicity claimants and posthumous celebrity-photographic copyright-holder clashes, it is the lack of national certainty and clarity. Although state legislatures would likely favor pub-

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[161] Epstein, *supra* note 127, at 126.

[162] Epstein explains both the encouragement for the creator and drawback to the creative public that copyright provides:

> [A] copyright works like a property right: the longer period of exclusivity increases the incentive to create the invention or writing in the first place. Unfortunately, on the downside, a copyright works like a legal monopoly: it restricts dissemination after creation, because the copyright or patent holder will charge some fee for the use of the writing or invention.

Id.

[163] This includes the late singer Sonny Bono and The Walt Disney Corporation. Lawrence Lessig, Op-Ed., *Let the Stories Go*, N.Y. TIMES, Apr. 30, 2001, at A19, *available at* 2001 WLNR 3338543.

[164] *See, e.g.*, Amy Harmon, *Debate to Intensify on Copyright Extension Law*, N.Y. TIMES, Oct. 7, 2002, at C1, *available at* 2002 WLNR 4444442.

[165] U.S. CONST. art. I, § 8, cl. 8. California Congresswoman Mary Bono, however, while speaking about her late husband, for whom the Sonny Bono Copyright Term Extension Act is named, stated the following:

> Sonny wanted the term of copyright protection to last forever. I am informed by staff that such a change would violate the Constitution. . . . As you know, there is also [then-MPAA president] Jack Valenti's proposal for term to last forever less one day. Perhaps the Committee may look at that next Congress.

144 CONG. REC. 24,336 (1998) (statement of Rep. Bono).

[166] *See* U.S. CONST. art. I, § 8, cl. 8.

licity rights over copyrights,[167] the issue is moot because copyright is constitutionally derived.[168] Uncertainty remains as to whether Congress will ever consider addressing the right of publicity at the federal level. Although Congress looks favorably upon copyright holders,[169] arguing that Congress would favor copyright over publicity rights would be too speculative because the latter has never been addressed. Courts can try their hands at legislating from the bench, but a survey of recent case law demonstrates that judges are categorically disinclined to do so.[170] The Supreme Court has never granted certiorari on the issue, and lower courts prefer circumventing the conflict rather than directly addressing it. Some contend that extension of the Copyright Act simply "pads the wealth of the widows and children of the original copyright holders."[171] A parallel argument can be made against celebrity estates. Perhaps the question turns on whose heirs are more deserving of the economic benefits derived from the work. By examining the reasoning of both sides, the most equitable solution may be to favor one group while allowing the other to exercise a check on its use.

A. Why Is That *Photograph Valuable?*

Celebrities' estates are concerned with preventing the unjust enrichment of the photographers' estates.[172] The reason that a photograph of a deceased celebrity tends to retain value, and therefore create demand, is because the image is of the celebrity, rather than a more "regular" person.[173] Undoubtedly, the value of a copyrighted photograph of a landscape or piece of architecture belongs to the

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[167] *See supra* Part III.

[168] U.S. CONST. art. I, § 8, cl. 8.

[169] In light of the continued extension of copyright duration, the congressional trend seems to support stronger copyright protection.

[170] *See supra* Part II.

[171] Epstein, *supra* note 127, at 128 (discussing generally *Copyright Term, Film Labeling, and Film Preservation Legislation: Hearing on H.R. 989, H.R. 1248, and H.R. 1734 Before the Subcomm. on Courts and Intellectual Prop. of the Comm. on the Judiciary*, 104th Cong. (1996)).

[172] *See generally* Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 573–76 (1977).

[173] This may not be the case in a limited number of instances involving photographers who are celebrities in their own right, such as Andy Warhol. Warhol's silkscreen images of Marilyn Monroe, however, are a strong example of the creativity that could potentially flow from current artists' ability to access copyrighted photography. *See generally* Web Exhibits, Andy Warhol's Marilyn Prints, http://www.webexhibits.org/colorart/marilyns.html (last visited Feb. 3, 2009).

photographer. The persona captured in the photograph of a celebrity, however, is precisely the thing that a right of publicity is designed to protect. Allowing a photographer's heirs to profit from the goodwill created by, and to the exclusion of, a celebrity after she has passed hardly seems just.

B. Lockean Labor Considerations

Perhaps, from a Lockean standpoint,[174] because a celebrity has put forth the effort to hone his craft and increase his recognition during life, he should reap those rewards even after his death.[175] In the case of someone like James Brown, who presumably worked very hard to perfect his craft, for someone like Bill Gates to profit from Brown's hard work and stardom would be unfair. Is the hard work expended over the lifetime of a performer like James Brown any more substantial than that taken to hone the art of photography by someone who took his picture? Recognition of a celebrity's labor requires a mutual recognition of a photographer's efforts. The constitutional concern for a photographer's labor may be persuasive. The basis of a photographer's claim—copyright law—recognizes his unique contribution to his photographs.

C. What About the Individual's Motivations?

A study of relevant case law suggests that the intent and motivations of the deceased celebrity should be examined.[176] The opportunity for fame and fortune certainly inspires many to perform in the beginning of a career. But is the promise of celebrity, specifically the

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[174] *See generally* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 287–96 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

[175] *See, e.g.*, Kevin M. Fisher, Comment, *Which Path to Follow: A Comparative Perspective on the Right of Publicity*, 16 CONN. J. INT'L L. 95, 97 (2000).

[176] To say that a reasonably accurate determination of the deceased's intent and feelings on the matter would allow courts to glean information leading to a potentially more equitable judgment is fair; however, the reasonableness of determining the intentions of the dead is questionable. In regard to the intentions of Elvis Presley,

> [t]he Sixth Circuit [in *Memphis Dev. Found. v. Factors Etc., Inc.*, 616 F.2d 956 (6th Cir. 1980)] . . . provided a psychological analysis of the motivations for achieving celebrity status, and concluded that the desire to pass along a right of publicity to one's heirs likely is not a strong motivation for becoming a celebrity. In other words, Presley likely would have chosen fame and fortune, over being dirt poor regardless of whether the right of publicity was descendible.

William A. Drennan, *Wills, Trusts, Schadenfreude, and the Wild, Wacky Right of Publicity: Exploring the Enforceability of Dead-Hand Restrictions*, 58 ARK. L. REV. 43, 79–80 (2005).

ability to bequeath the economic remuneration of one's celebrity, a strong incentive for aspiring performers? An adolescent at a piano lesson or football practice likely does not think that far ahead. And someone like Marilyn Monroe, who had no prospect of a descendible right of publicity at the time of her death in 1962, would very likely not have imagined that California would enact a retroactive statute forty years later. In the case of many of California's celebrities, the ability to pass on their celebrity could not have motivated them at all. Celebrity photographers, on the other hand, are far more likely to be aware of and motivated by copyright protection. Although a young photographer learning his craft may not be motivated by postmortem copyright protection, a professional with celebrity subjects certainly would be. The photographer's intentions should therefore be considered as well.

Copyright's finite protection is also meant to encourage creativity. Unless the photographer knew that his work would be exclusively his for life plus seventy years, he may have less motivation to exert the time and energy needed to perfect his craft. Allowing publicity rights to block licensing creates a disincentive for photographers to take celebrities' pictures. Photographers have little reason to outlay resources without the promise of reward. This stalemate renders copyright possession of celebrity photographs sterile. It can also have a negative effect on celebrities, as their public awareness is dependent upon the recognition provided by the mass availability of their image.[177] Without a financial incentive for photographers, fewer pictures of celebrities will be taken and, therefore, less overall "celebrity" will exist to go around.

D. Public Perception of the Deceased

The ability of a celebrity's heirs to better control the public perception of the deceased weighs in favor of a pro-publicity rights approach. After a celebrity's death, the only way for an estate to continually generate income is to maintain a positive public image and

[177] This principle has been recognized regularly by courts in publicity-rights suits:

> Celebrities . . . are often not fully responsible for their fame. Indeed, in the entertainment industry, a celebrity's fame may largely be the creation of the media or the audience. . . . As one actor put it, "Only that audience out there makes a star. It's up to them. You can't do anything about it . . . . Stars would all be Louis B. Mayer's cousins if you could make 'em up."

Cardtoons, L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959, 975 (10th Cir. 1996).

demand. Because the celebrity can no longer produce new material after death, one's persona and the public's memory is the undercurrent of a strong revenue stream. Likely, one's estate has a better understanding of the celebrity's interests and preferences than does a photographer. If a photographer could license the celebrity's image for any legitimate purpose, one bad apple could spoil the bunch. The inability of a dead celebrity to perform again or make a "comeback" means that one poorly received association or endorsement could eradicate all future value in that persona. Economically, the celebrity's estate is favored in regard to maintaining the value of a deceased celebrity.

E. The Luck Factor

Becoming a celebrity often requires something more intangible than hard work and talent; it often requires significant amounts of luck.[178] Luck comes in varying amounts and often is reciprocal to talent. In cases of personalities like Paris Hilton and Kim Kardashian, who should certainly attribute a considerable portion of their celebrity to luck, a photographer who has worked long and hard to master his art lays a strong claim to a copyrighted photograph of one of them. In some circumstances, though, luck also plays into the hand of the photographer. An example is the famous 1965 photograph taken by Neil Leifer of Muhammad Ali standing over a knocked-out Sonny Liston.[179] In the photograph, one can see several other photographers attempting to capture the exact same shot as Leifer during a decisive moment in boxing's history. By a stroke of luck, Leifer's image is iconic and valuable, while the other photographers' shots are not. Ali was not posing for the picture,[180] yet when he dies his heirs could make publicity claims to prevent certain uses of that photograph. Leifer's photograph shows that luck not only makes celebrities who they are but also makes some photographs what they are.

F. Financial Reliance on Images

Most celebrities neither make their living nor aspire to become famous from their photographs. Musicians like James Brown become

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[178] *See id.*; *see also* NASSIM NICHOLAS TALEB, THE BLACK SWAN 30–31 (2007) (attributing actors' success mostly to luck and randomness).

[179] *See* Neil Leifer, Muhammad Ali Knocks Out Sonny Liston, May 25, 1965, http://www.artnet.com/artwork/424690130/149245/neil-leifer-muhammed-ali-knocks-out-sonny-liston-may-25-1965.html.

[180] The fact that the shot was taken amidst an Ali match, however, is significant.

famous and, therefore, derive value from their personality because of their music and performance abilities. Actresses like Marilyn Monroe aspire to take on great roles that lead to fame and fortune. These other, and usually chief, sources of income can provide economic stability for celebrities during their lives and for their estates after their deaths. Photographers, on the other hand, rely on their photographs as their principle means of income. The photograph itself is the art, and the subject is but one aspect of it. Upon a photographer's death, he can no longer take pictures. A photographer's heirs, therefore, rely solely on the revenue provided by the pictures he took during his life. When Muhammad Ali passes, his estate will have many opportunities to exploit his persona.[181] When Neil Leifer passes, however, his heirs will have seventy years to derive income from his photograph before it becomes part of the public domain and loses significant value. For the opportunistic Alis to deprive the dependent Leifers of their opportunity to exploit Neil's work may be unfair.

G. The Proposed Test

Although a congressional act would immediately resolve this issue, such a prospect is unlikely, and therefore, resolution is left to the judiciary. But to adopt a bright-line rule in favor of either group under all circumstances is not ideal. Strict rules are easily applied by judges but not easily accepted by disfavored parties with legitimate claims. The optimal result will be steeped in fairness yet manage to maximize overall value.

When both the celebrity and the photographer have died, the photographer's estate should prevail under most circumstances. The photograph of the actor is the photographer's art and contribution to the world, whereas the actor's contribution is his acting. Photographers' estates should be afforded the right to exploit the images to enjoy the limited monopoly that copyright is designed to provide;[182] however, this use cannot go unchecked.

Deceased celebrities' estates should have a right to bring suit but only when an image is used distastefully (not whenever an image is merely used). Courts should adopt an objective/subjective test to make these determinations and enjoin copyright holders when a use

[181] *See, e.g.*, ALI (Columbia Pictures 2001).

[182] *See* Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 429–33 (1984) (discussing the limited monopoly granted to copyright holders).

is determined to be distasteful. When an image is used in a way that the celebrity's estate feels is either (1) objectively distasteful or (2) subjectively against the celebrity's personal wishes or values, then the copyright holder should be enjoined from using the image in that manner.

A trier of fact can employ an objective-use test to determine whether the image is being used in a way that is generally distasteful or disrespectful to the dead.[183] One factor to be considered is whether the general public will likely have a negative association with that celebrity after the proposed use. A successfully applied subjective test would place the burden on the celebrity's estate to show that the celebrity's opinions or values would have been in conflict with that use if she were still living.[184] This approach would allow courts to make obvious determinations quickly and easily while allowing celebrities' estates to fulfill the deceased's individualized wishes.

Courts could easily implement the proposed test, which would fulfill many of the goals of both copyright and publicity law in addition to potentially preventing costly and lengthy litigation. Allowing photographers' estates to exploit their photography in tasteful ways promotes the copyright goals of granting a limited monopoly and fostering creativity. Photographers have a limited monopoly on their images provided that they exploit them tastefully. The test imposes no restraint on the photographer's creativity while taking the pictures. The only potential imposition rests on the eventual use of the image, which is in line with the goal of publicity rights.

Because the proposed test is rooted in equitable concerns, it not only protects copyright holding photographers but also values the contribution of celebrities. The test does not prevent celebrities' estates from exploiting their image and, therefore, allows the estates to continue deriving value from the deceased's fame. It also breaks the

[183] For example, if the image associated the celebrity with an objectively unattractive quality or habit, such as obesity or drug abuse, the court could enjoin that use fairly easily.

[184] One could prove this by proffering some of the celebrity's public or private statements, including journal entries and donations or involvement in causes that reflect the celebrity's opposition to specific uses. For example, copyright holders of images of Christopher Reeve, a well-known proponent of human-embryonic stem cell research after a paralyzing accident, would be enjoined from licensing his image for use in a campaign against stem cell research. *See* Christopher and Dana Reeve Found., http://www.christopherreeve.org (last visited Feb. 3, 2010). It could also allow the estate of a celebrity who seriously opposed exploitation of child labor in a third-world country to prevent that celebrity's association with a company found to operate sweatshops.

current stalemate arising from the photographer's attempt to exploit his photographs and the celebrity's ability to assert her publicity rights in an effort to deny him. The photographer's ability to use the images can also be beneficial to deceased celebrities. One of the necessary components of maintaining the value of a deceased personality is remaining in the public eye. Photographers' estates that exploit the celebrity's image in tasteful ways would keep the celebrity relevant and, therefore, would help the celebrity's estate retain value through other means. Finally, because photographers' estates will want to avoid the costs and time of litigation, they would likely take the celebrity's ideals into consideration before exploiting an image. This resolution promotes comity, consultation between estates before selling a license, and co-exploitation, all of which potentially amount to revenue for both parties through compromise.

VI. CONCLUSION

Upon the recognition of competing legal interests, both the legislature and judiciary can only evade an issue for so long before direct confrontation will occur. In the case of the conflicting rights of deceased celebrities and photographers, now is the time to address the legal stalemate concerning postmortem rights of publicity and copyright. Adopting the proposed test will allow courts to successfully navigate the murky waters of forthcoming litigation. This proposal not only presents a means to resolve disputes, but it does so in a way that is in tune with the goals of both publicity rights and copyright law. Given the recent movement of increasing the duration of both of those rights after one's death, this test will help resolve the increase in litigation involving such issues and will expectantly encourage comity between the estates of deceased celebrities and the photographers who helped them achieve and maintain their fame.